

VOLPP

4/16/09 Copy

ORIGINAL

1 231  
2 SUPREME COURT OF THE STATE OF NEW YORK  
3 COUNTY OF NEW YORK  
4 . . . . . x  
5 JOHN RESTIVO, DENNIS HALSTEAD, MELISSA LULLO,  
6 JASON HALSTEAD, HEATHER HALSTEAD and TAYLOR  
7 HALSTEAD,  
8 Plaintiffs,  
9 - against - CV-06-6720  
10 (JS)(WDW)  
11 NASSAU COUNTY, JOSEPH VOLPE, in his  
12 individual capacity, ROBERT DEMPSEY, in his  
13 individual capacity, FRANK SIRIANNI, in his  
14 individual capacity, MILTON GRUBER, in his  
15 individual capacity, HARRY WALTMAN, in his  
16 individual capacity, ALBERT MARTINO, in his  
17 individual capacity, CHARLIE FRAAS, in his  
18 individual capacity, THOMAS ALLEN, in his  
19 individual capacity, RICHARD BRUSA, in his  
20 individual capacity, VINCENT DONNELLY, in his  
21 individual capacity, MICHAEL CONNAUGHTON, in  
22 his individual capacity, WAYNE BIRDSALL, in  
23 his individual capacity, WILLIAM DIEHL, in his  
24 individual capacity, JACK SHARKEY, in his  
25 individual capacity, DANIEL PERRINO, in his  
individual capacity, ANTHONY KOZIER, in his  
individual capacity, DETECTIVE SERGEANT  
CAMPBELL (SHIELD #48) in his individual  
capacity, ROBERT EDWARDS, in his individual  
capacity, SEAN SPILLANE, in his individual  
capacity, JOHN DOE OFFICERS AND DETECTIVES  
#1-10, in their individual capacities, and  
RICHARD ROE SUPERVISORS #1-10, in their  
individual capacities,  
19  
20 Defendants.  
21 . . . . . x  
22 UNITED STATES DISTRICT COURT  
23 EASTERN DISTRICT OF NEW YORK  
24 . . . . . x  
25 JOHN KOGUT,  
26 Plaintiff,  
27 - against - CV-06-6695  
28 (JS)(WDW)  
29 THE COUNTY OF NASSAU, POLICE

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2 COMMISSIONER DONALD KANE, POLICE COMMISSIONER  
3 WILLIAM J WILLETT (2005), POLICE COMMISSIONER  
4 JAMES LAWRENCE, DETECTIVE SEAN SPILLANE (HEAD  
5 OF HOMICIDE 1985), DETECTIVE DENNIS FARRELL  
6 (HEAD OF HOMICIDE 2005), DETECTIVE JOSEPH VOLPE,  
7 DETECTIVE ROBERT DEMPSEY, DETECTIVE ALBERT  
8 MARTINO, DETECTIVE WAYNE BIRDSALL, DETECTIVE  
9 MILTON G. GRUBER, DETECTIVE CHARLES FRAAS,  
10 DETECTIVE FRANK SIRIANI, DETECTIVE HARRY  
11 WALTMAN, P.O. MICHAEL CONNAUGHTON, P.O.  
12 WILLIAM DIEHL, and JOHN DOES 1-5,

13

Defendants.

14

15 100 Federal Plaza  
16 Central Islip, New York  
17 April 6, 2009  
18 11:27 A.M.  
19

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25 CONTINUED VIDEOTAPE DEPOSITION of JOSEPH  
VOLPE, one of the Defendants, taken by Plaintiffs,  
pursuant to Notice, held at the above-noted time  
and place, before a Notary Public of the State of  
New York.

1 233

2 A P P E A R A N C E S :

3  
4 COCHRAN, NEUFELD & SCHECK, LLP  
5 Attorneys for Plaintiffs John Restivo,  
6 Dennis Halstead, Melissa Lullo, Jason  
7 Halstead, Heather Halstead and Taylor Halstead  
8 99 Hudson Street  
9 New York, New York 10013  
10 BY: BARRY SCHECK, ESQ.  
11 DEBORAH CORNWALL, ESQ.

12 GRANDINETTE & SERIO, LLP  
13 Co-Counsel for Plaintiff John Kogut  
14 114 Old Country Road, Suite 420  
15 Mineola, New York 11501  
16 BY: ANTHONY M. GRANDINETTE, ESQ.

17 LORNA B. GOODMAN  
18 Nassau County Attorney  
19 One West Street  
20 Mineola, New York 11501  
21 BY: MICHAEL FERGUSON  
22 Deputy County Attorney  
23 and  
24 LIORA M. BEN-SOREK  
25 Deputy County Attorney

26 ALSO PRESENT:

27 CARLOS NUNEZ, Videographer

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234

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3 (Debbie Smith lead sheet was marked  
4 as Plaintiff's Exhibit 158 for  
5 identification, as of this date.)

6

7 (Statement of Deborah Smith was  
8 marked as Plaintiff's Exhibit 159 for  
9 identification, as of this date.)

10

11 (Debbie Smith call was marked as  
12 Plaintiff's Exhibit 160 for identification,  
13 as of this date.)

14

15 (Interview 12/6/84 of John T. French  
16 was marked as Plaintiff's Exhibit 161 for  
17 identification, as of this date.)

18

19 (Loss from John French's car was  
20 marked as Plaintiff's Exhibit 162 for  
21 identification, as of this date.)

22

23 (John French statement was marked as  
24 Plaintiff's Exhibit 163 for identification,  
25 as of this date.)

26

27 (People who were in French's car was  
28 marked as Plaintiff's Exhibit 164 for  
29 identification, as of this date.)

30

31 (French car fingerprint reports was  
32 marked as Plaintiff's Exhibit 165 for  
33

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identification, as of this date.)

3

4 (French missing car report was  
5 marked as Plaintiff's Exhibit 166 for  
6 identification, as of this date.)

7

8 (Crime scene search unit document  
9 was marked as Plaintiff's Exhibit 167 for  
10 identification, as of this date.)

11

12 (Missing person flier for Theresa  
13 Fusco was marked as Plaintiff's Exhibit 168  
14 for identification, as of this date.)

15

16 (11 pages of photos was marked as  
17 Plaintiff's Exhibit 169 for identification,  
18 as of this date.)

19

20 (Google area map was marked as  
21 Plaintiff's Exhibit 170 for identification,  
22 as of this date.)

23

24 THE VIDEOGRAPHER: This is tape  
25 number one, Volume 4, of the continuation of  
the videotape deposition of Mr. Joseph  
Volpe.

26

27 The time is now 11:27 A.M. and will  
28 the court reporter please reswear the  
29 witness.

30

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2 3 6

2 J O S E P H V O L P E, the witness herein, having  
3 been first duly sworn by Jeanette L.  
4 Hoolan, a Notary Public in and for the  
5 State of New York, was examined and  
6 testified as follows:

7 THE COURT REPORTER: Would you state  
8 your name on the record, please?

9 THE WITNESS: Joseph P. Volpe,  
10 V O L P E.

11 CONTINUED EXAMINATION BY  
12 MR. SCHECK:

13 Q Mr. Volpe, it was a little over  
14 two weeks ago that we last discussed the wire tap  
15 affidavit that you submitted in this case.

16 Do you remember that?

17 A Yes.

18 Q And have you had a chance to read  
19 your answers in the deposition that we had  
20 two weeks ago?

21 A No.

22 Q Have you thought about it some more?

23 MR. FERGUSON: Objection.

24 A Oh, of course, yes.

25 Q Okay. And what happened the last

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VOLPE

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2 time is that when you saw paragraph 10 of the  
3 Exhibit 157, the eavesdropping warrant, we agreed  
4 that you noticed a problem there, right?

5 MR. FERGUSON: Objection.

6 A Yes.

7 Q And the problem was that in this  
8 affidavit you indicated that a search of that van  
9 produced a hair consistent with Theresa Fusco's  
10 and this affidavit you filled out was done at a  
11 time before Detective Fraas testified he could  
12 have completed his examination wherein he found a  
13 hair consistent with Theresa Fusco's, correct?

14 A My problem with this is that I  
15 didn't recall. The basic problem I had with this  
16 I didn't recall who told me or gave that  
17 information prior to going for the affidavit on  
18 the 29th of March.

19 Q So you now have an explanation?

20 A No, I don't.

21 MR. FERGUSON: Objection to the form  
22 of the question.

23 A I just don't recall who told me  
24 about the hairs, you know, I can't speculate or  
25 guess.

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VOLPE

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Q Okay. So let's see --

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A

4

That's what the problem is I'm  
having.

5

Q

So let's see if I got this right.

6

We

7

correct?

8

A Right.

9

Q He's the hair examiner, right?

10

A That's correct.

11

Q

And when we reviewed it you agreed  
that based on his testimony he couldn't have  
possibly completed his examination of the hair  
until March 31st, which was at least two days  
after you swore out this affidavit, right?

16

MR. FERGUSON: Objection.

17

A

No, I thought that Fraas said that  
he could do it anywhere from four hours to four  
weeks, that type of statement that he made, to you  
obviously.

21

Q Didn't he say --

22

A Didn't he say hours?

23

Q

Didn't he say he could not have  
possibly completed the hair examination within  
three or four days?

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MR. FERGUSON: Objection.

3

A I don't recall.

4

5

6

MR. FERGUSON: It's not for him to  
say what somebody else could have said or  
did say, the record will speak for itself.

7

8

9

MR. SCHECK: We have these questions  
and answers. I reviewed the deposition with  
him of Mr. Fraas and so let's just be clear  
about that, okay.

10

11

12

MR. FERGUSON: I'm not disputing  
anything that you say ..

13

14

MR. SCHECK: You read the deposition  
from last week, sir?

15

16

17

MR. FERGUSON: Whatever I did, I  
did. It's not for you to know that. I'm  
not here to be deposed.

18

19

20

MR. SCHECK: In terms of your  
objection I just want to make sure you read  
last week's deposition. Did you?

21

22

23

MR. FERGUSON: I am not here to be  
deposed. I'm objecting to your questions  
where I feel they are improper.

24

25

MR. SCHECK: Let's just keep it at  
that.

1 VOLPE

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2 Q So if I understand you now, we agree  
3 that after we reviewed Fraas' testimony he, at  
4 least based on his deposition and trial testimony  
5 in this case, indicated he could not have possibly  
6 have finished the hair examination by March 29th,  
7 the date that you swore out this affidavit saying  
8 that there was a hair consistent with Theresa  
9 Fusco's in the Restivo van?

10 MR. FERGUSON: Same objection.

11 A I thought we said between four hours  
12 and four weeks. If you can correct me on that,  
13 that's what he said.

14 Q You now think ..

15 A I'm not sure.

16 MR. FERGUSON: Wait for a question.

17 Q All right, here we go. Let me see  
18 if I understand what you're saying. You don't  
19 recall Fraas saying to you prior to filling out  
20 this affidavit and prior to him completing the  
21 hair examination, oh, Volpe, we've discovered a  
22 hair consistent with Theresa Fusco, right?

23 A If I have that information it may  
24 not have come from Fraas, come from a supervisory  
25 level, I just don't recall. It doesn't have to

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VOLPE

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2 come from Fraas.

3 Q Who else could it have come from?

4 A Could have come Birdsall, could have  
5 come from one of the supervisors.

6 Q Who would the supervisor be?

7 A Spillane would have been the boss,  
8 Lieutenant Spillane.

9 Q So you're thinking that Fraas told  
10 Lieutenant Spillane that he had found a hair  
11 consistent with Theresa Fusco's in the Restivo van  
12 before he completed his hair examination?

13 MR. FERGUSON: Objection. He didn't  
14 say that.

15 Q Is that what you're thinking?

16 A No, that's not what I'm thinking nor  
17 did I say that. What I'm saying is I don't recall  
18 who would have given me that information that I  
19 would have in turn put in paragraph 10 here,  
20 that's what my issue is.

21 Q So you think Birdsall could have  
22 told you that?

23 A I don't recall.

24 Q Let me -- so even though we  
25 reviewed together Fraas' testimony that he could

1 VOLPE 242

2 not have completed his hair examination until  
3 after you filled out this affidavit on March 29th.  
4 it's your assumption, I guess, that somebody must  
5 have told you that there was a hair consistent  
6 with Theresa Fusco's in the Restivo van because  
7 you wouldn't put such a statement in a warrant if  
8 nobody had told you that, right?

9 A That's correct.

10 Q And that's because you would never  
11 put anything in an affidavit for a warrant that  
12 nobody had told you to be true?

13 A If I hadn't had that information I  
14 wouldn't have put it in there.

15 Q Well, let's go back to paragraph 10.  
16 That says, again, a search of the van has produced  
17 hair consistent with Theresa Fusco's and possible  
18 human blood.

19 Do you see that?

20 A Yes.

21 Q Okay. So who was it that processed  
22 the van, Birdsall?

23 A Fraas and Birdsall.

24 Q And you didn't go inside and process  
25 the van, did you?

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VOLPE

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2

A No.

3

Q So they reported back to you their  
4 reports, right?

5

A Not on the first night, just what

6 they had collected.

7

Q So you were counting on Birdsall to  
8 report to you whether or not he found possible  
9 human blood in the van?

10

A Or certainly him or one of his  
11 supervisors or one of my supervisors.

12

Q But as far as you know it was  
13 Birdsall that was processing the van?

14

A As far as I know, yes.

15

Q So you would expect that Birdsall  
16 would have been the person that reported back to  
17 you that there was possible human blood in the  
18 van, right?

19

MR. FERGUSON: He just said three  
20 times the list of people it could have been.  
21 He's already answered that three times.

22

Q Can you answer my question?

23

A I've already -- could have been  
24 anyone, could have been any one of my supervisors  
25 or a lab supervisor.

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Q All right. Let's go back to this issue of human blood. Are you with me?

A I'm with you, yes.

Q Birdsall was the one that processed the van, right?

A Correct.

Q So Birdsall, if there were possible human blood in the van Birdsall would have told it to you, right?

A No, he would have told it to his supervisor.

Q Let's just go through the possibilities. He might have told it directly to you, that's one possibility, right?

A Might have, yes.

Q And he might have told it to his supervisor who would then in turn told it to you, right?

A Or told it to one of my supervisors.

Q Okay. Now, you would not you're telling us put in a warrant this affidavit of March 29th, that there was possible human blood in the van, unless you would receive that information from Birdsall himself, Birdsall's supervisor or

1 VOLPE

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2 your supervisor, right?

3 A That would be it, correct.

4 Q And the source of the observation  
5 that there was possible human blood in the van,  
6 that would have to come from Birdsall, right,  
7 because he's the one that processed the van?

8 A I don't know that. I don't know if  
9 he had anybody assisting him or supervising him, I  
10 don't know that.

11 Q Now, this is a copy of Birdsall's  
12 deposition in this case and tabbed for you first  
13 page 71 and I'm starting at line 10. Okay, are  
14 you with me?

15 A I got you.

16 Q And Mr. Birdsall was asked:

17 Question: "Did you collect any  
18 blood from the van?"

19 Answer: "No."

20 Question: "Did you see anything  
21 that was possibly human blood in the van?"

22 Answer: "No."

23 Question: "Did you collect any  
24 semen from the van?"

25 Answer: "No."

1 VOLPE 246

2 Question: "Did you conduct any  
3 serological testing whatsoever on any part of the  
4 van or anything collected from it?"

5 Answer: "No."

6 Question: "Did you tell anybody,  
7 anybody, that you had found anything that was  
8 possible human blood?"

9 Answer: "No."

10 Do you see that?

11 A Yes.

12 Q How do you explain that?

13 MR. FERGUSON: Objection.

14 A Well, you're describing what  
15 Birdsall said.

16 Q This is Birdsall's testimony, right?

17 A Yes.

18 MR. FERGUSON: Objection.

19 A That doesn't mean that there wasn't  
20 blood on clothing or some other area in the van.

21 Q Well ..

22 A You're asking me about the van or  
23 was he talking about the vehicle in its entirety  
24 or its contents?

25 Q Let's talk about your affidavit,

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VOLPE

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2 your affidavit on March 29th said to the judge  
3 that; "a search of that van has produced hair  
4 consistent with Theresa Fusco's and possible human  
5 blood." Right?

6 A Yeah.

7 Q It didn't say possible human blood  
8 on a piece of clothing, did it?

9 A No.

10 Q It said possible human blood in the  
11 van?

12 A In the van, but it could have been  
13 anywhere, could have been on a blanket.

14 Q Okay. On a blanket, well --

15 A Could have been on anything.

16 Q If there was possible human blood on  
17 a blanket in the van wouldn't you put that in your  
18 affidavit?

19 MR. FERGUSON: It says in the van.

20 You're saying wouldn't he put it in the  
21 affidavit --

22 MR. SCHECK: Don't, don't. I don't  
23 want to hear any speaking objections from  
24 you, sir.

25 MR. FERGUSON: This is not a

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speaking objection.

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MR. SCHECK: No, it is a speaking

objection. Don't suggest any answers to the  
witness.

Q Now I'm asking if you had found

human blood on the blanket in the van wouldn't you  
have stated that in the affidavit?

A I may not have known it at that

time. It's a very benign statement, that there's  
human blood in the van, wherever I got it from.

Q Well, based on Birdsall's testimony

over here on page 71 of his testimony, when he  
says, did you tell anybody you had found anything  
that was possible human blood and the answer is  
no, do you see that?

A Yes.

Q Well, isn't it pretty clear that

according to Birdsall's testimony you couldn't  
have got that information from him or from him  
reporting to his supervisor or from Birdsall  
reporting to his supervisor to your supervisor,  
right?

MR. FERGUSON: Just note my

objection.

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A I don't -- I don't know how to  
3 answer that in a way that would be satisfactory.  
4 I just, I recall in the same time frame being told  
5 about there were hairs similar and that there was  
6 possible human blood. I can't tell you who it  
7 was, can't tell you.

8

Q Let's take a look at page 150 --  
9 115 of the Birdsall deposition starting at line  
10 20. You with me?

11

Question: "With the exception of  
12 identifying hairs on a blanket that you removed  
13 and forwarded to Detective Fraas did your  
14 examination of any items yield any probative  
15 evidence?"

16

Answer: "No."

17

Question: "No blood?"

18

Answer: "No blood."

19

Question: "No semen?"

20

Answer: "No semen."

21

Question: "Nothing of value to the  
22 investigation?"

23

Answer: "No."

24

Do you see that?

25

A Yes, I do.

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Q So Birdsall is being clear that he  
didn't see anything in the van, on a blanket, that  
was possible blood; right?

5

A That's what he's indicating here,  
yeah.

7

Q And he's the one, to the best of  
your knowledge, that processed the van for  
serological fluids, right?

10

A Yes, I guess. I don't know who else  
would have done it.

12

Q Well, you have any idea whatsoever  
how you could write paragraph 10 of this affidavit  
based on information from Birdsall?

15

A But I'm not saying I got it from  
Birdsall, you know. I put that information there  
on Birdsall. I just don't recall who gave it to  
me, but I got it.

19

Q How do you know you got it?

20

A Because I put it in paragraph 10.

21

Q Right.

22

A I wouldn't have recorded that.

23

Q So it's not possible at all that you  
put in paragraph 10 that a hair consistent with

25

Theresa Fusco was found in the van because you had

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VOLPF

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2 advance knowledge that a hair from Theresa Fusco's  
3 dead body was already in the samples that had had  
4 been forwarded to Fraas for examination?

5 MR. FERGUSON: Just note my  
6 objection.

7 A Not at all. I had no idea.

8 Q Okay. Now I'd like to ask you just  
9 a few questions about how communications and  
10 passage of paperwork goes between the homicide  
11 detectives and the DA, okay?

12 A Okay.

13 Q We have been -- what has been  
14 produced to us is a lot of files that have been  
15 called the homicide file in this case, okay?

16 A Okay.

17 Q And it was the practice at the time  
18 of this investigation for homicide detectives to  
19 keep a file of what was going on in the case,  
20 right?

21 A Yes.

22 Q And this would include your  
23 handwritten notes, right?

24 A Yes.

25 Q It would include lead sheets,

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VOLPE

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2 correct?

3 A Yes.

4 Q It would include reports about the  
5 examination of physical evidence?

6 A Correct.

7 Q It would include witness interviews?

8 A Yes.

9 Q Now, was it your practice to turn  
10 over absolutely ever document in the homicide file  
11 to the District Attorney?

12 A I would hope so.

13 Q Every document?

14 A Well, it should have. The file  
15 should be -- the file should be in the DA's the  
16 same or similar or the same as the homicide file.

17 Q Are you telling me that it was your  
18 practice that when the District Attorney opened up  
19 an investigation of the case that you would turn  
20 over to the District Attorney's office as opposed  
21 to keeping it at the police department, every  
22 document in the homicide file?

23 Do you see what I'm asking you?

24 A I'd like to believe that every  
25 document went over or went with it as the file was

1 VOLPE 253

2 brought over there, that I don't know, I don't  
3 know for sure.

4 Q How would the file get brought over  
5 there? I don't understand.

6 A I brought it when I went to court,  
7 at the onset with meetings with the District  
8 Attorney as to where it was going, if there were  
9 any arrests. Updates on witness statements, on  
10 the investigation as it was done, SIB reports or  
11 lab reports.

12 You would keep the DA -- you would  
13 try to keep the DA up to breast as to what you  
14 were doing.

15 Q Who would do that, would you as lead  
16 homicide detective?

17 A Could have been, one of the people I  
18 could have delegated that to someone depending on  
19 how busy I was.

20 Q Was there any particular rule or  
21 regulation in the police department that said that  
22 every document in a homicide investigation should  
23 be turned over to the District Attorney?

24 A Well, every document, you mean  
25 including newspaper articles and the like?

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Q Or a lead sheets or lead sheets?

3

A Well, sure, because they would be subsequently used I believe.

5

6

Q What about a lead that wasn't pursued?

7

A I don't -- I don't recall.

8

Now we're talking particularly in the Fusco matter?

10

11

12

13

Q Yes. In this case, what about a lead that didn't pan out that had nothing to do John Restivo, Dennis Halstead or John Kogut, would you have turned over such lead sheets?

14

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A I would like to believe I would have turned that over, I just don't recall.

Q But there's no way for you to know for sure that you would have turned over lead sheets from parts of the investigation that didn't work out and didn't connect Kogut, Restivo or Halstead?

A I would believe I would have tried

to maintain that file to go to the DA.

Q You believe you would, but there was no process that would assure that you would have turned over absolutely every document?

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A I just don't recall.

3

Q Now, I'd like to show you a document  
4 that we've premarked, actually three documents  
5 that we've premarked, Exhibit 158.

6

A Can I close this one?

7

Q Yes.

8

That is a lead sheet from a witness  
9 named Debbie Smith, a document 159, that is a  
10 statement from Debbie Smith and a document that is  
11 160 which is a note from Detective Mitchell dated  
12 12/11/84 quoting Debbie Smith.

13

Do you see all those.

14

Here, counsel you can have copies.

15

Now does the name Debbie Smith ring  
16 a bell to you?

17

A It didn't until as I read.

18

MR. FERGUSON: Could you give him a  
19 chance to look at it a second.

20

Q I'll go over with you, I'll read it  
21 to you, but does the name Debbie Smith ring a bell  
22 to you? I see you're reading. Why don't we just  
23 read this together. Why don't we start with  
24 document 158.

25

Now you recognize that this is what

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VOLPE

256

2 they call a homicide lead sheet?

3 A Yes.

4 Q All right. And it indicates that  
5 the lead was received by you on December 9th,  
6 1984, at 4:25?

7 A Yes.

8 Q And how would that work, would that  
9 mean that you directly got the call that's  
10 explained in this document or it could have been  
11 passed on to you, how would that work?

12 A Could be either way.

13 Q And under the lead source it says  
14 Debbie Smith, right?

15 A Yes.

16 Q And that the nature of the lead,  
17 called and stated between 11/17 and 11/20 she was  
18 driving over at Sunrise and Rockland between 2100  
19 and one hours, meaning between, what would that  
20 be, 11 -- no, what's 2100 hours?

21 A Nine p.m.

22 Q Nine p.m. and 1 a.m., right?

23 A No, midnight.

24 Q Sorry?

25 A No, midnight. 0001 is a minute

1 VOLPE

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2 after 12.

3 Q That would be a minute after 12,  
4 okay. So from 9 o'clock to a minute after 12  
5 during that period she was at Sunrise and Rockland  
6 and she heard a scream, right?

7 A Correct.

8 Q That's what it says. And then she  
9 went, what is that word?

10 A Where?

11 Q On the third line, there's three  
12 letters there, something to railroad tracks?

13 A Got, G-O-T.

14 Q So this is your handwriting, right?

15 A Yes.

16 Q You got to say yes?

17 A I said yes.

18 Q When she got to the railroad tracks  
19 on Rockland there was a car parked with no one in  
20 it. Auto possibly tan four-door older vehicle  
21 large windows, had tools and dark colored blanket  
22 in auto, right?

23 Do you see that?

24 A Yes, yes.

25 Q Does that ring any bell to you?

1

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2

A Uh, I remember, I remember the lead.

3

I don't remember the substance of what I did after  
4 that.

5

Q Okay. So why don't you take a look  
6 at Exhibit 159, the statement of Debbie Smith, do  
7 you see that, this one, 159?

8

A I'm going to read the lead sheet  
9 first.

10

Q Okay, read the lead sheet.

11

All right, have you finished 158?

12

A Yes.

13

Q Having read the lead sheet which is  
14 a document of two pages, 158, does this ring a  
15 bell, do you remember this Debbie Smith interview?

16

A Not too clearly, no.

17

Q Now, turning to 159, and you can see  
18 that this is entitled statement of Debra L. Smith  
19 and it's dated December 9th, 1984, right?

20

A Yes.

21

Q And that's the same day that she  
22 called in, right?

23

A Yes.

24

Q And so -- and do you recognize the  
25 signature at the bottom of the page, is that

1

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2 Sirianni?

3 A No.

4 Q Who is that?

5 A That's Detective Pierce.

6 Q Detective Pierce?

7 A George Pierce.

8 Q So Detective Pierce went out and  
9 took a statement from her, right?

10 A I think Pierce was with Detective  
11 Lane, yeah.

12 Q Detective Pierce, right, do you see  
13 that?

14 A Yes.

15 Q So Detective Pierce went out and  
16 took a sworn statement from her that very day that  
17 she called in, December 9th, right?

18 A Yes.

19 Q And the beginning of this statement  
20 he has her -- she says, I have been told by the  
21 detective who is writing this statement that any  
22 false statement I make here are punishable as a  
23 Class A misdemeanor pursuant to Section 210-45 of  
24 the Penal Law of the State of New York, right?

25 A Yes.

1 VOLPE

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2 Q So this is a serious statement,  
3 she's being told if she makes a false statement  
4 this could be a crime, right?

5 A Yes.

6 Q All right. And she then describes  
7 an incident and the incident she describes is that  
8 she went to her boyfriend's house for the evening,  
9 they had an argument and she left his home to go  
10 home, right, and she started driving home.

11 Do you see that on the first page?

12 MR. FERGUSON: Could he have an  
13 opportunity to read the three pages before  
14 you question him about this document.

15 You're asking him questions and he's trying  
16 to read, it's a three-page document.

17 MR. SCHECK: I was reading it to  
18 him, but if he wants to read it first.

19 MR. FERGUSON: But you're giving him  
20 a document ..

21 MR. SCHECK: No, no, let him read  
22 the whole thing first, if that's what you're  
23 asking.

24 Go ahead, you take your time.

25 (Pause in proceedings.)

1

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2

3

Q You're finished Exhibit 159, the

three-page sworn statement of Debbie Smith?

4

A Yes.

5

6

Q Now, does it refresh your

recollection?

7

A I don't remember Debbie Smith.

8

9

Q Okay. Now, let's turn to the second

page and I'm going to -- she says on page 2, "I

10 drove north on Rockland Avenue to Sunrise Highway.

11 the traffic light was red and I stopped for the

12 light. I had my window partly opened because I

13 was smoking. While I was sitting at the light I

14 heard a woman scream. I rolled my window down and

15 listened, but that I did not hear anything else.

16 The scream came from the left like it was from up

17 high. I looked at the railroad elevated because

18 that seemed to be the direction that the scream

19 came from."

20

Q Do you see that?

21

A Yes.

22

Q Now, this location of Rockland and

23 Sunrise, if she's driving in the direction that

24 she states, right?

25

A Yes.

1

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2

Q That scream would come from the area  
3 where Theresa Fusco's body was found, right?

4

A I don't know which side of the  
5 tracks she was on. Rockland, there's a traffic  
6 light. The traffic light would be south of the  
7 entranceway into where Theresa's body was found.  
8 She couldn't have heard her from Sunrise and  
9 Rockland.

10

Q She couldn't have heard her from  
11 Sunrise and ..

12

A I don't believe so.

13

Q She's at Sunrise and Rockland.

14

A Sunrise and Rockland, she's got to  
15 be on the other side of Sunrise. She's got to be  
16 on the south side.

17

Q She said, I heard it from the left,  
18 okay, her left?

19

A Well, the left would be inconsistent  
20 with where the body was found, but geographically  
21 she's going to be on the other side of Sunrise  
22 Highway. She's going to be on the south side  
23 light facing north.

24

Q Let's see if we can orient  
25 ourselves.

1

VOLPE

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2

3

A She's six lanes away, in other words.

4

5

Q And I'll show you a document that was marked Exhibit 170, do you see that?

6

7

8

MR. FERGUSON: Could you hold it a second and give us a chance to orientate ourselves as to what this is.

9

10

11

MR. SCHECK: And 128 is a larger map, just a blow-up that we've put here, okay?

12

13

14

MR. FERGUSON: Yeah, I know it is.

This map, it's a Google map from 2009. This is Exhibit what?

15

16

17

MS. BEN-SOREK: 170.

MR. FERGUSON: This is Exhibit 170?

18

19

20

21

22

23

24

25

Q Now let me show you I have a version of Exhibit 170, we have a large one here. Now the scene in this case, the location is in the north bank of the Long Island Rail Road tracks on the north side of Sunrise Highway between Rockland Avenue and Park Drive in Lynbrook, right?

MR. FERGUSON: Say it again, would

you please, on what side?

Q Sure. I'm giving you Plaintiff's

1

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2 Exhibit 45?

3 MR. FERGUSON: 45?

4 MR. SCHECK: Yes.

5 Q I'll show this to you. This is a ..  
5 it's your report, all right? And I think I'm  
7 reading from it accurately.

8 MR. FERGUSON: What are you reading?

9 MR. SCHECK: Plaintiff's 45. Can I  
10 have the document so I can read it? Let me.

11 A North bank of the railroad tracks?

12 Q Yes. It said the scene in this case  
13 in the north bank of the Long Island Rail Road  
14 tracks on the north side of Sunrise between  
15 Rockland Avenue and Park Drive in Lynbrook; is  
16 that accurate?

17 A Yes, I'm okay with that.

18 Q And let me show you on Exhibit 170,  
19 this is 178. Do you see where the number 2 is?

20 A Yes. I do.

21 Q And that's been identified as the  
22 location of Theresa Fusco's body found on December  
23 5th, 1984.

24 Does that look accurate to you?

25 MR. FERGUSON: Just note my

1

VOLPE

265

2

objection.

3

4

This is not a map drawn to scale; is  
that correct?

5

A Generally speaking --

6

7

Q It's a fair and accurate  
representation of --

8

A Kind of.

9

10

Q Of where the body is based on the  
map, would you not agree?

11

12

13

MR. FERGUSON: Just note my  
objection. There's no scale on this map at  
all.

14

Q This is a Google map, right?

15

A Yes.

16

17

18

19

20

21

22

23

24

25

Q And admittedly it's not drawn to  
scale. But would you agree that location number 2  
here that's identified as location of Theresa  
Fusco's body is in about the area where the body  
was found on December 5th?

A Well, on the Google map I wouldn't

have put the 2 there, I would have moved it a

little bit.

Q Where would you move it to?

A You got it right on Park Place. The

1

VOLPE

266

2

body was more right here.

3

Q All right. Why don't you take this  
red pen and put an X as to where you think the  
body was.

6

A I don't know if I can though, the

7 same reason I ...

8

Q You just said it was a little  
9 closer.

10

A You said it was a Google map and I  
11 said this is not accurate like I'd like it to be.  
12 If you want to get it accurate it would have to be  
13 to scale.

14

Q Knowing that it's not drawn to scale  
15 and it's just a Google map, all right ...

16

A Uh-huh.

17

Q Could you do your very best in terms  
18 of showing us on the map where you think the body  
19 was found if it's not in the area that we've  
20 circled as 2?

21

A I'm uncomfortable with it, you  
22 understand why though, why I'm uncomfortable even  
23 just to make a mark. I'm going to memorialize  
24 something that I don't even know if it's accurate  
25 based on the sizes.

1 VOLPE

267

2 Q What we're trying to do here is,  
3 understanding that this is not drawn precisely to  
4 scale, it's a Google map ..

5 MR. FERGUSON: What do you mean  
6 precisely, it's not even drawn in any way to  
7 scale.

8 Q Are you saying this map doesn't help  
9 you at all in terms of just locating the general  
10 area of where Theresa Fusco's body was found?

11 A I'm uncomfortable with it, but ..

12 Q I'm talking about general area where  
13 number 2 is, not saying precise place where the  
14 body was, right, wouldn't you agree that's the  
15 general area where the body was found?

16 A I shouldn't label that way, and I'm  
17 not being sarcastic, don't get me wrong. I  
18 understand that this has got to be done the right  
19 way but it should have been labeled as general area  
20 then I would feel more comfortable with it.

21 Q This says location. I will amend it  
22 and I will say general area; does that help you?

23 A Makes it easier for me.

24 Q All right, I'll put down here  
25 general area, okay?

1

VOLPE

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2

A I'm not geting this copy, am I?

3

Q Yeah, that's an exhibit. We'll put  
down general area right there too, okay?

4

A I'm okay with it now.

5

Q Good. And would you agree from what  
Debbie Smith says is that she stopped, she drove  
north on Rockland Avenue to Sunrise Highway, the  
traffic light was red, I stopped for the light. I  
had my window partly opened because I was smoking,  
right? I was sitting at the light and I heard a  
woman scream. I rolled my window down and  
listened, but did not hear anything else, the  
scream came from the left and like it was up high,  
okay?

16

Now wouldn't you agree that where 4  
is here would be the location of Debbie Smith's  
car, that is Sunrise and Rockland, at the time  
that she reported hearing the scream?

17

A Yes.

18

MR. FERGUSON: Note my objection.

19

A Yeah, but I ..

20

Q Yes?

21

A Yes.

22

Q And assuming that this map is north,

1

VOLPE

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2

okay, if she's at the location 4 wouldn't you  
3 agree that when she says she heard a scream coming  
4 from her loft she heard a scream from the general  
5 area of where Theresa Fusco's body was eventually  
6 found, fair enough?

7

A I'm uncomfortable with that. I find  
8 it hard to believe. It's December 9th, it's cold,  
9 she got the window open because she was smoking  
10 and unless you've been there, physically seen that  
11 location at that traffic light, that railroad  
12 mound, you couldn't even see Noble Machinery or  
13 any of the businesses on the other side.

14

This is, you're talking about  
15 three lanes, six lanes and an island over here.  
16 Here's where she is. The four takes up west and  
17 east.

18

M.R. FERGUSON: Just note my  
19 objection, Mr. Scheck. If I may I don't  
20 know if I'm permitted to say this, you let  
21 me know, but you've got Number 4 in the  
22 middle of the roadway and not at the light  
23 where she supposedly says she is. If I'm  
24 out of line you let me know, but I think  
25 this map is inaccurate.

1

VOLPE

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2

Q Detective, with this red pen, all right, could you draw an X in the area of the 4 if you can do it more precisely as to where you believe her car would have been located if she had stopped at the light at Sunrise and Rockland?

7

A This is the curb, so she can't be over the curb, she's got to be here and there's three lanes, island, three lanes.

10

(The witness complied with the request)

12

Q Now, you see that she is saying that it's not December that this happened, it's November?

15

A It's November.

16

Q Right?

17

A Sorry.

18

Q Is that okay?

19

A Obviously, the weather, she's only opening the window enough to get the smoke out. I don't know what the temperature studies were at that time in November.

23

Q She's saying that in the area where you put the red mark, right, she's saying she rolled her window down and sometime between nine

1 VOLPE

271

2 and 12 on a night in November she heard a scream  
3 coming from the general area of where Theresa  
4 Fusco's body was found, right?

5 A Yes.

6 Q And that's a potential lead, isn't  
7 it?

8 A Well, that's up for evaluation, you  
9 have to investigate the lead.

10 Q Well, she's calling in on December  
11 9th and Theresa Fusco's body was found on December  
12 5th, right?

13 A One of hundreds of leads that came  
14 in.

15 Q But that was a lead, right?

16 A It was a lead, that's all it was.

17 Q Well, you took the lead, right?

18 A Yeah, and you prioritize it or you  
19 delegate someone to follow it up.

20 Q Well, the same day that she called  
21 in at 4:25 and you took the lead sheet Detective  
22 Pierce went out and immediately got a sworn  
23 statement from her, right?

24 A Absolutely, yes.

25 Q One reason that this could be an

1 VOLPE

272

2 important lead in the case is that she's parked  
3 where -- she's stopping at a light. Now, Theresa  
4 -- withdrawn.

5 Let's do it this way. Theresa Fusco  
6 disappeared or she was last seen at 9:30 on  
7 November 10th, correct?

8 MR. FERGUSON: Note my objection.

9 A 9:40 or something like that.

10 Q 9:40, right? She was last seen at  
11 Hot Skates, correct, leaving Hot Skates?

12 A Yes.

13 Q And let's write on this map, you see  
14 where it's 1, is that you think a fair and  
15 accurate representation of the general location of  
16 where Hot Skates is?

17 A Fair and accurate, general, yes.

18 Q Just a general location, right?

19 A All of the above, yes, I can live  
20 with that.

21 Q So she disappears or she's last seen  
22 around 9:40, okay. This location where she's got  
23 her car stopped at the light, that's near Hot  
24 Skates, right?

25 MR. FERGUSON: Note my objection.

1

VOLPE

273

2

When you say near that's what I'm objecting  
to.

4

A What is near?

5

Q Well, it's a short distance away  
from Hot Skates, isn't it?

7

M.R. FERGUSON: Same objection.

8

A To answer that, my definition of  
near and yours might be different than yours might  
be a quarter mile, might be an eight of mile.

11

Q How far is that, you know this area,  
don't you?

13

A At that time I did.

14

Q Yeah.

15

A Maybe between an eighth, maybe about  
an eighth of a mile, maybe a little bit more.

17

Q Now, you see what we've marked  
number 5 and identified that as Theresa Fusco's  
home in 1984; do you see that?

20

A Yes.

21

Q Would you think that is a fair and  
accurate representation of the general location of  
where Theresa Fusco's home was, right?

24

A Same answer, yes, generally.

25

Q So Debra Smith is hearing a scream

1

VOLPE

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2 sometime between nine and 12 p.m. on a night in  
3 November in an area that is really between Hot  
4 Skates and Theresa Fusco's home, right?

5 A Yes.

6 Q And near and to the left of from  
7 where she's facing, to the left of an area where  
8 Theresa Fusco's body is eventually found, right?

9 A Yes.

10 Q So looking back at this now you  
11 can -- wouldn't you agree that potentially Debbie  
12 Smith's statement here is a pretty significant  
13 lead?

14 A Well, again, the investigation or  
15 the obligation to do the investigation, we have  
16 her missing November 10th, I don't recollect, but  
17 I think Miss Smith is after the 10th. She's  
18 giving a three-day window from the 17th through  
19 the 20th.

20 Q Right. But when she's filing this  
21 report, she's coming forward, it's about a month  
22 after Theresa Fusco disappeared, right?

23 A What is, her information?

24 Q Yes, when she's calling in this lead  
25 it is now December 9th and Theresa Fusco

1 VOLPE

275

2 disappeared on December 10th, right?

3 A Her body was found on December 5th,  
4 that's what lights up Debbie Smith coming forward.

5 Q Right, Debbie Smith comes forward  
6 because it was reported in the press the next day  
7 that Theresa Fusco's body was found, right?

8 A Yeah.

9 Q And the area where it was found,  
10 right? Yes?

11 A Yeah.

12 Q She now reports an incident to you  
13 that happened a few weeks earlier; correct?

14 A Her recollection, yeah.

15 Q Okay. And I show you what's been  
16 marked as 160 and this is a report from Detective  
17 Mitchell on December 11th who says that Debbie  
18 Smith called command and states she is not sure if  
19 she saw the automobile before November 17th and  
20 November 20th, or between November 10th and  
21 November 14th; do you see that?

22 A I certainly do, yes.

23 Q So and in your experience what's  
24 really important ordinarily is sequence.

25 Sometimes witnesses when recalling something in

1

VOLPE

276

2 the past get the dates mixed up, but the sequence  
3 of events is very important for an investigator to  
4 follow, right?

5 A Well, add a little more to this one,  
6 she was trying it seemed to me when you say as an  
7 investigator that she was trying to bring it in  
8 with November 10th through 14th to be helpful.

9 Q Wait a second.

10 A Because her first reaction is that  
11 it's the 17th through the 21st.

12 Q As you're saying this right now,  
13 you're just speculating because the fact of the  
14 matter is as you sit here today you have no  
15 memory --

16 A I don't.

17 Q Of the Debbie Smith lead, right?

18 A I don't.

19 MR. FERGUSON: Objection.

20 A What I'm reading.

21 Q Well, you're reading that and I'm  
22 just pointing out to you ..

23 MR. FERGUSON: But your question was  
24 about investigation, as you do  
25 investigations. You mean as in general?

1

VOLPE

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2

Q I'm asking you a general question  
about investigations and the general question  
about investigations is often when witness comes  
forward to describe something that happened weeks  
earlier, right, they get the dates wrong, but as a  
trained investigator what you try to focus on are  
the sequence of events, right?

9

A I can live with that.

10

Q And so Debbie Smith is reporting an  
incident where she has a fight with her boyfriend  
and then she drives to this location of Rockland  
and Sunrise Highway and stops at a light and hears  
a scream from the general area of where Theresa  
Fusco's body is found, right?

16

A Right.

17

Q And if it turns out when she checks  
with her boyfriend and goes through her calendar  
it that is more likely to have happened on the  
period between November 10th, right, than in the  
November 17th period that would be important to  
you as an investigator, correct?

23

MR. FERGUSON: Objection.

24

A Well, I don't know what motivated  
the change with her.

1

VOLPE

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2

Q Okay.

3

A All right, I don't recollect.

4

Q You don't remember this at all.

5

okay, let's go a little further in the statement?

6

MR. FERGUSON: Which one?

7

A Which one?

8

Q 159. Are you with me?

9

A Give me a second, okay.

10

Q Do you see it?

11

A Go ahead.

12

Q Next thing she says, "The traffic light changed and I drove across Sunrise Highway and under the railroad overpass. I saw a large light to medium tan car, four-door sedan, early '70s, it had large windows. I looked inside and I saw a lot of stuff in the back seat. I think there were tools, a blanket and other stuff in the back seat. During this time I got out of my car and I looked around towards the railroad trestle, I looked at the license plate. I remember there were four numbers and three letters and a shiny sticker on the left side of the rear bumper. I also remember that the car had a broken windshield and a ticket in the left, 'what is that, 'front

1 VOLPE 279

2 window on the dashboard."

3 Do you see that?

4 A Yes.

5 Q Now, is this beginning to ring a  
6 bell to you about the tan car?

7 A Generally, it does, but it's  
8 ringing a bell to me as I'm reading, but as far as  
9 my recollection today --

10 Q The next thing she says --

11 MR. FERGUSON: He's trying to answer  
12 the question and you're speaking over him.

13 MR. SCHECK: I understand. I'm  
14 sorry, I didn't mean to speak over him.

15 A You know, this is my recollection  
16 today.

17 Q Yes.

18 A So it's all from what I'm reading  
19 from what Pierce did, but if Debbie Smith walked  
20 in I wouldn't know her, you know.

21 Q But at each point along the way as  
22 you can tell, what I'm trying to do in fairness is  
23 see if any of these documents refresh your  
24 recollection and when it does you tell me, okay?

25 A Some do, some don't, as you can see.

1

VOLPE

280

2

Q All right. Now the next sentence  
is, "Today," and that's December 9th, right, the  
same day she reported this lead to you.

5

"I received a phone call from  
6 Detective Joseph Volpe who asked me to come to  
7 police headquarters and view a car that they have  
8 there. I met with Police Officer Lane and  
9 Detective Pierce who showed me a 1971 Oldsmobile  
10 Delta 88 and I have looked at the car. I feel  
11 that this is the car I saw that night. The only  
12 reservation I have is that the interior of the car  
13 does not have all of the stuff in it that the car  
14 had when I had stopped by the railroad crossing."

15

Do you see that?

16

A Yes.

17

Q Now, do you remember as soon as, you  
18 know, the same day that you got this lead from  
19 Debbie Smith saying that she had heard a scream in  
20 the area where Theresa Fusco's body is found when  
21 she stopped at the light and then she said she saw  
22 this tan car with a broken windshield.

23

That immediately rang a bell for  
24 you, didn't it?

25

A Repeat that?

1 VOLPE

281

2 Q You knew what that tan car was,  
3 didn't you?

4 A I don't recall today what I had.

5 Q Incidentally, just so we're clear  
6 about this, on the lead sheet, the first lead  
7 sheet which I think is 158 ..

8 A Go ahead.

9 Q In addition to saying that she ..  
10 in the lead sheet looking at the second paragraph  
11 down, right, or the third paragraph, do you see  
12 where I am right here?

13 A Yes.

14 Q She also stated that there was a lot  
15 of garbage in the rear seat and remembers a  
16 blanket, thinks tools and rope. Do you see rope?

17 A Yes.

18 Q So among -- when you put the lead  
19 sheet together with her statement, she saw a lot  
20 of stuff in the back seat, tools, a blanket and a  
21 rope; fair enough?

22 A Yes.

23 Q Now, I'm showing you what's 161,  
24 premarked Exhibit 161, okay, you want to read  
25 that?

1 VOLPE 282

2 A Might I please?

3 Q Sure. Do you see that -- are you  
4 finished 161?

5 A Yes.

6 Q Does this document refresh your  
7 recollection?

8 A I remember the car. I remember the  
9 car and the incident.

10 Q Do you know whose handwriting this  
11 is on 161?

12 A On 161?

13 Q Do you happen to recognize the  
14 handwriting?

15 A I'm trying to. I can't, I can't.

16 Q Well, I represent to you, sir, that  
17 this was a document that we found in the homicide  
18 file and we don't know whose handwriting it is,  
19 but I represent to you this came from the homicide  
20 file?

21 A Yes.

22 MR. FERGUSON: What is the question?  
23 Is there a question here?

24 MR. SCHECK: I'm about to get to it.

25 MR. FERGUSON: Okay, he's saying yes

1

VOLPE

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2

and I'm trying to get to the question.

3

4

Q Are you saying you recognize the  
handwriting or you don't?

5

A I don't.

6

7

Q But you can see that this is a  
report dated December 6th, 1984, right?

8

A Yes.

9

Q And 6:40 p.m., right?

10

A 1840 hours, 6:40 p.m.

11

12

Q And the person who wrote this report  
says, present at 58, what is that?

13

A Broadway, I think.

14

15

16

17

18

19

20

21

22

23

24

25

Q 58 Broadway, Malverne, New York,

home of John French. He stated that on November

10th, '84 his 1971 Oldsmobile, registration

52332JN New York. His car was parked on the

southwest corner of Lakeview and Ocean Avenue, it

was stolen sometime between 2130 and 2305 hours.

That would be what, 9:30?

A 9:30 p.m.

Q And 11--

A 11:05 p.m.

Q That date. Now between 9:30 and

11:05, that's, on November 10th, that's around the

1

VOLPE

284

2 time that Theresa Fusco was last seen alive,  
3 right?

4 A Yes.

5 Q And let me -- looking at number 3  
6 on our map, okay, would you agree that number 3 is  
7 drawn to be the southwest corner of Lakeview and  
8 Ocean Avenue which is the location where John  
9 French reported his car was stolen on November  
10 10th, 1984, sometime between 9:30 and 11:05,  
11 right?

12 A Yes.

13 Q Now, in the next paragraph of this  
14 interview with Mr. French, all right, go back to  
15 that.

16 A Got it.

17 Q He then says on November 18th, 1984,  
18 Mr. French went out looking around for his car.  
19 He entered Lakeview and he found it parked on  
20 Woodfield near the railroad tracks. He then got  
21 his keys and drove the car to the Lynbrook police  
22 department. Prior to going to the police  
23 department his sister, Lori, found a pair of  
24 lady's bluejeans with stripes. Bluejeans were  
25 inside out, jeans were found on the right rear

1

VOLPE

285

2 floorboard halfway under the right passenger seat.

3 Do you see that?

4 A Yes.

5 Q Now, I show you what's been marked  
6 as Exhibit 168. That is a copy of the missing  
7 poster that was distributed about Theresa Fusco,  
8 correct?

9 MR. FERGUSON: This is 168, okay.

10 Q Yes?

11 A Do I remember seeing this one?

12 Q Yeah.

13 A Oh, yes.

14 Q And wouldn't you agree that when  
15 Theresa Fusco was last seen alive she was wearing  
16 striped bluejeans?

17 A I don't recall the description  
18 Mrs. Napoli gave us.

19 Q Take a look at that.

20 A Well, but I don't remember her  
21 saying in her missing person report, and this, I  
22 believe, was the first one. They may have amended  
23 it, that's all I'm saying.

24 Q Looking at Exhibit 46 which is the  
25 missing persons report, do you see where it says

1

VOLPE

286

2

she was last seen wearing bluejeans striped;  
3 correct?

4

A Yes, I do.

5

Q So wouldn't you agree that the tan  
6 car that French reports as stolen, right, is the  
7 same car that you took Debbie Smith to look at,  
8 right?

9

A I don't remember if that's what it  
10 says.

11

Q Isn't that what it says in your  
12 report?

13

A I don't recall.

14

Q Go back and look at 159.

15

A Oh, okay, yes.

16

Q Right?

17

MR. FERGUSON: 159 is not his  
18 report. What are you referring to?

19

Q I'm referring to 159 that is the  
20 sworn statement by Detective, taken by Detective  
21 Pierce, where Debbie Smith says that she received  
22 a call from Detective Volpe who asked me to come  
23 to police headquarters and view a car that they  
24 have there. Do you see that?

25

A Yes, Yes, Yes.

1

VOLPE

287

2

Q And that was the tan car that John French reported stolen, right?

4

A Yes.

5

Q And he reported it stolen at or around the time on November 10th that Theresa Fusco went missing, right?

8

A Within the time frame.

9

Q Yes, within the time frame, right?

10

A 9:30 to 12 -- whatever he said on his report.

12

Q And now French is saying that his sister found a pair of striped jeans, lady's jeans, underneath the right rear seat of the car turned inside out, right?

16

A Okay, yes.

17

Q Now, don't you think that that's a pretty important lead?

19

A I don't have a clear recollection right now, but that whole portion of that investigation was followed up.

22

Q Well --

23

A I just don't remember.

24

Q I understand you don't remember.

25

A What the end result was.

1

VOLPE

288

2

Q I know you don't remember, but just going through the documents, right, and examining them, wouldn't you agree with me that Debbie Smith reports seeing a tan car in the area where Theresa Fusco's body was found, right. Yes?

7

A Yes.

8

Q And then you take her and you show her a car that John French reported being stolen that night, right?

11

A Yes.

12

Q And John French says that when he found the car later on November 18th in that car were striped lady's jeans, right?

15

A Yes.

16

Q Now, as a trained investigator wouldn't you think that there was a chance that somebody, the perpetrator of this crime, had abducted Theresa Fusco in that tan car, disrobed her there and the jeans that had been turned inside out, the lady's striped jeans, came from Theresa Fusco?

23

A My problem in answering that is that I can't recall how that lead was finished.

25

Q Well, we're going through this right

1 VOLPE 289

2 now.

3 A But we're just starting.

4 Q We're just starting it.

5 A Now this is the finding of the car,  
6 I don't recall what the forensics on the car was.

7 I don't know if there was anything in the car that  
8 was any value to us.

9 Q Let's just take it a step at a time,  
10 all right, Detective?

11 A I hope you would.

12 Q Wouldn't you agree that it is an  
13 important working theory one would have as an  
14 investigator that when Debbie Smith says she saw  
15 this tan car in the area where Theresa Fusco's  
16 body was found, right?

17 A Yes.

18 Q And that car had in it striped jeans  
19 which are consistent with the description of the  
20 last -- of the clothing that Theresa Fusco was  
21 last seen wearing, right?

22 MR. FERGUSON: Objection. She  
23 didn't say this car had striped jeans. The  
24 way your question is phrased, it says, she  
25 said.

1 VOLPE 290

2 MR. SCHECK: I'll withdraw that.

3 Thanks.

4 Q She said she saw this tan car,  
5 right?

6 A Yes.

7 Q And let's look at the top of her  
8 statement here, all right, 159?

9 A 159.

10 MS. BEN-SOREK: What page?

11 MR. SCHECK: The third page of her  
12 statement.

13 Q She also says, I also remember that  
14 the car had ..

15 A Wait a minute, third page. I  
16 thought you said the top. Sorry, go ahead.

17 Q I also remember that this car had a  
18 broken windshield. See that?

19 A Yes.

20 Q Let me introduce to you, we'll mark  
21 it as 167 and here's 169.

22 When you look at 167 and 169, don't  
23 you recognize this to be photographs that were  
24 taken of the John French car on December 6th,  
25 1984; correct?

1

VOLPE

291

2

A By the documentation, yes.

3

Q And if you notice at the top of 167  
4 it indicates that the vehicle had a cracked  
5 windshield, right?

6

A Correct.

7

Q And that's consistent with what  
8 Debbie Smith said she saw, right?

9

A Yes.

10

MR. FERGUSON: Can you give me a  
11 chance to look at these documents. This  
12 document is not dated. You got to put the  
13 date on this exhibit sticker, no?

14

MS. CORNWALL: That will be done.  
15 You have courtesy copies as well.

16

MR. FERGUSON: Okay, but I'm trying  
17 to just look at them a second.

18

MS. BEN-SOREK: I ask we agree that  
19 there are 11 photographs attached in 169 for  
20 the record. Just make sure that we have it  
21 all.

22

MS. CORNWALL: Yes.

23

MS. BEN-SOREK: Thank you.

24

THE WITNESS: We're good, 11.

25

Q Now, do you have any recollection of

1

VOLPE

292

2 this car now? I'm asking you for your independent  
3 recollection.

4 A I have no recollection of this  
5 portion of the investigation with French's car.

6 Q Okay. What is your recollection?

7 MR. FERGUSON: Objection. What is  
8 the question?

9 Q What do you remember about this,  
10 about the investigation of French's car, what is  
11 it that you remember?

12 A That I remember Debbie Smith, the  
13 car, the recovery of the car, report that it was  
14 stolen and recovery by the owner and the  
15 evaluation. I don't recall the results of the  
16 evaluation by the lab on the car, in other words  
17 the processing of the car. I just don't remember  
18 it.

19 Q Now, there was a Detective Doughty  
20 that was working on this case, right, do you  
21 remember there was a Detective Doughty?

22 A From missing persons bureau,  
23 Detective Doughty.

24 Q Now, we have 62. Let me just show  
25 you a copy of 62. Let me see if this refreshes

1 VOLPE

293

2 your recollection.

3 MR. FERGUSON: Can I see what you're  
4 showing him before you ask anything.

5 MR. SCHECK: Yes, take a look at the  
6 highlighted paragraph, okay.

7 MR. FERGUSON: Is this 62 or  
8 something else, this is 62?

9 MR. SCHECK: Yes, Bates stamp number  
10 5425, okay. Why don't you look on with your  
11 lawyer, okay?

12 MR. FERGUSON: Let me just see what  
13 this is first.

14 Q Now, you see here that in Doughty's  
15 investigation he says and I'm reading from  
16 Bates stamp page 5425. On November 23rd Detective  
17 Bailey and I went to the Lynbrook Police  
18 Department. There we received information that a  
19 John French had reported his car stolen on  
20 November 11th from Lakeview Avenue and Ocean  
21 Avenue. The car was recovered on November 18th  
22 with different plates on it by the owner at  
23 Lakeview. Bluejeans that were found in the car  
24 were turned in to the Lakeview Police Department  
25 to Sergeant Spraig (phonetic). He saw Sergeant

1 VOLPE 294

2 Spraig later that evening and he said the pants  
3 were thrown into the garbage.

4 Do you see that?

5 A Yes.

6 Q So obviously Spraig didn't realize  
7 the importance of these striped jeans that were  
8 found inside out in the French car, right?

9 A I don't recall this, but ...

10 Q Doesn't that make sense to you based  
11 as an investigator?

12 MR. FERGUSON: What's your question?

13 Q Obviously the Lynbrook police when  
14 they got this car from French on November 18th  
15 they didn't know about the Debbie Smith call,  
16 right? Debbie Smith didn't call in until  
17 November, November 9th, right?

18 MR. FERGUSON: November 9th?

19 Q December 9th, I'm sorry, December  
20 9th, right?

21 A Yes.

22 Q So doesn't it appear to you as  
23 though the Lynbrook police, it turns out, threw  
24 these jeans away?

25 A My difficulty is that the

1 VOLPE

295

2 jurisdiction where the car is found is not  
3 Lynbrook's jurisdiction.

4 Q What does that matter?

5 A It doesn't matter, but,

6 Q It was told to the Lynbrook police  
7 department. I'm trying to be very specific with  
8 you now, okay? Based on what Debbie Smith said  
9 there was a tan car that she says was French's  
10 car, right?

11 MR. FERGUSON: She didn't say it was  
12 French's car.

13 MR. SCHECK: That is not true.

14 MR. FERGUSON: You want to be  
15 specific?

16 Q Did she not state, say in her  
17 statement, that she believed that the car she was  
18 taken to see by you on December 9th, right, which  
19 was French's car, is the car that she saw that  
20 night?

21 A But she didn't know John French.  
22 Isn't that, comma, which is French car, comma?  
23 That's the detectives writing that statement. I  
24 don't have any recollection of Debbie knowing John  
25 French.

1

VOLPFE

296

2

Q That's not the point of my question  
and you know it.

4

A What is it?

5

Q My point is that Debbie Smith said  
in her sworn statement to Detective Pierce that  
the car that she saw on a November night in the  
area . . .

9

A Well, on a November night, okay.

10

Q -- where Theresa Fusco's body was  
found was John French's car, right, she said that?

12

A Yeah, we brought her in to view the  
car.

14

Q Right, and she said that's the car I  
saw, right?

16

A Yeah, yes.

17

Q And before she had seen the car she  
said she seen a car with a broken windshield that  
was tan car, right?

20

A Yes.

21

Q And that matched exactly what  
French's car was like, right?

23

A Yes.

24

Q And we now know that in French's car  
on November 18th striped lady's bluejeans had been

1

VOLPE

297

2 found under the rear seat, right?

3 A Yes.

4 Q And that would be consistent would  
5 it not with Theresa Fusco having been abducted by  
6 somebody and her striped bluejeans being taken off  
7 and left in the car, right?

8 A I can't, I just can't agree with  
9 that. I mean, there's a lot of information there,  
10 but I can't make it an absolute that Theresa Fusco  
11 was in French's car that night. I just can't do  
12 it.

13 Q I'm not asking you for an absolute.

14 I'm asking, looking at this information, wouldn't  
15 you agree that was a theory that you were  
16 developing after you got the Debbie Smith call?

17 A Correct.

18 Q And doesn't it make sense that if  
19 she saw a tan car with a broken windshield and the  
20 windshield wasn't broken when the car was stolen  
21 on November 10th, that would indicate that there  
22 might have been a struggle in the car with Theresa  
23 Fusco and that's how the windshield got broken?

24 MR. FERGUSON: Objection.

25 A Oh, I can't agree with that, I

1

VOLPE

298

2 can't.

3 Q You really can't, why not?

4 MR. FERGUSON: Objection.

5 A I don't know the quality of the  
6 glass, I don't know punching it, kicking it,  
7 pitchfork. A cracked - windshield is the  
8 strongest window in the car, the windshield, front  
9 windshield.

10 Q Well, let me show you ..

11 A I saw the picture.

12 Q I understand. Just so that .. I'll  
13 show you 162, okay? And you can see that's a  
14 report from Mitchell, correct?

15 MR. FERGUSON: Can we have a chance  
16 to look at this?

17 MR. SCHECK: Yes.

18 MR. FERGUSON: What number is this?

19 MR. SCHECK: 162.

20 Q Do you see that, this is a statement  
21 taken from John French on December 11th, 1984, by  
22 Detective Mitchell, right?

23 A Notes, yeah, notes of Mitchell.

24 Q And Mitchell says that the  
25 windshield of his car was not broken prior to it

1

VOLPE

2 9 9

2 being stolen, right?

3 A Yes.

4 Q So now we have French's car being  
5 stolen at location number 3, right, between 9:30  
6 and 11 on November 10th, the night that Theresa  
7 Fusco went missing, right?

8 A Yes.

9 Q And Debbie Smith reports seeing this  
10 same car with the windshield broken near the area  
11 where Debbie Smith's body was found, right?

12 A Where Theresa Fusco's body was  
13 found.

14 Q Theresa Fusco's body was found,  
15 right?

16 A Yes.

17 Q And there were also striped ladies  
18 bluejeans that were found inside out that were  
19 found in French's car when he eventually recovered  
20 it, right?

21 A Right.

22 Q Now, putting that together as a  
23 detective isn't it logical to you that one  
24 possible lead here is that Debbie Smith heard a  
25 scream from Theresa Fusco on the night of her

1 VOLPE 300

2 murder and that when she drove through the  
3 intersection and saw this tan car that had been  
4 stolen from John French, the perpetrator was off  
5 with Theresa Fusco?

6 A Problem I have answering that  
7 question is, I'm trying to figure out what was  
8 done on the French/Debbie Smith lead, meaning the  
9 car in its entirety and the canvas, whatever else,  
10 I don't remember what we did.

11 Q Well, I'll go through that with you.

12 A You know what we did on that whole  
13 car and French.

14 Q Absolutely, but I'm only going  
15 through one step at a time.

16 A Appreciate that.

17 Q This document, Debbie Smith's  
18 statement that you got on December 9th, you  
19 immediately had taken her to see the French car,  
20 right?

21 A Absolutely.

22 Q And looking at this paperwork, the  
23 reason that seemed so important is that she had  
24 been stopped in an intersection, right, near the  
25 general area where Theresa Fusco's body had been

1

VOLPE

301

2 found; correct?

3 A Yes.

4 Q She heard a scream during a time  
5 period in the evening which was just after Theresa  
6 Fusco had last been seen alive, correct?

7 MR. FERGUSON: Just note my  
8 objection.

9 A Yeah, I mean I have a problem with  
10 that.

11 Q Well ..

12 A If she heard a scream and she  
13 stopped and got out of her car to look at French's  
14 car, what we now know to be French's car, you  
15 wouldn't have a time, she still leaves it that  
16 three hour time. I'm at an a disadvantage because  
17 I don't recall ..

18 Q We can go over the statement again  
19 now?

20 A I can't now because I'm just about  
21 starting to feel it, all right. I'm trying to go  
22 as long as I can with you.

23 MR. FERGUSON: Do you want to take a  
24 short break or do you want to keep on going.

25 MR. SCHECK: Well, it's up to him.

1

VOLPE

302

2

I know he doesn't have much time left.

3

A It's over an hour.

4

Q Just one more thing for you to consider, okay? If you're able, one little thing I'll point out to you here?

7

8

A Okay, yeah, then I want to use the men's room. Go ahead.

9

10

11

Q You notice that French indicated that there was a rope that was missing from his car, correct?

12

A Something he describes as ..

13

14

MR. FERGUSON: You saying French said that, is that what you're saying?

15

MR. SCHECK: Yes.

16

17

MR. FERGUSON: What document are you referring to here?

18

MS. CORNWALL: 162.

19

20

21

22

23

24

25

A Doesn't this say, this is loss from his auto so he lost all his tools and the rope.

See, I don't recall what this picture is from.

Q I'll show you what that is. But you

remember Debbie Smith saying in her statement in

her call sheet in her statement to you that in the

back seat of French's car she saw tools and she

1

VOLPE

303

2 saw a rope, right? Do you recall seeing that, a  
3 rope?

4 A The lead sheet.

5 Q In the lead sheet, it says rope, do  
6 you remember that?

7 M.S. BEN-SOREK: The record referred  
8 to exhibit--

9 A 158.

10 M.S. BEN-SOREK: 158.

11 A Read that four lines for me.

12 Blanket, thinks tools and rope. Thinks tools and  
13 rope. She wasn't positive on this. You're asking  
14 me to read what she wrote?

15 Q Rope.

16 A She says, thinks, thinks tools and  
17 rope.

18 Q You see that French said --

19 A What he lost.

20 Q There was a rope missing from his  
21 car, correct?

22 A Yes.

23 Q Now Theresa Fusco was murdered by  
24 ligature strangulation, right?

25 A Yes.

1

VOLPE

304

2

Q And there were -- and reading now  
3 from Exhibit 56, the autopsy report, let's see if  
4 this refreshes your recollection.

5

MR. FERGUSON: You're saying that's  
6 an autopsy?

7

MR. SCHECK: Yes.

8

MR. FERGUSON: 56.

9

Q The neck shows an extensive ligature  
10 abrasion about the neck measuring one inch on the  
11 right and central portions expanding approximately  
12 to one and three quarters inches over the region  
13 of the left carotid with a complete encircling of  
14 the neck structure, it is deep and reddish black  
15 in color with abrasions on the skin.

16

Do you recall that?

17

A Generally I recall. I haven't read  
18 that document in 25 years.

19

Q But you do recall that she was --  
20 cause of death was ligature strangulation?

21

A Yes.

22

Q And that would be consistent with  
23 being strangled by a rope, right?

24

A It's one of the tools of a ligature  
25 strangulation, is a rope.

1

VOLPE

305

2

Q        Yeah. And the injuries described in  
3 this autopsy report it's fairly extensive ligature  
4 strangulation, it goes around the whole neck,  
5 right?

6

A        Yes.

7

Q        And wouldn't you agree, this is the  
8 last question before you take a break or however  
9 you want to do it, wouldn't you agree that on  
10 December 9th when you got the lead from Debbie  
11 Smith the reason that you immediately took her to  
12 see John French's car is you thought that given  
13 what she said she saw, John French's car was  
14 involved in the homicide, right?

15

A        Well, not at that point. Just that  
16 it was an interesting lead to turn in to the  
17 investigation, it was very interesting.

18

Q        Very interesting lead, right?

19

A        But, you know, I didn't make a  
20 decision that John French's car was used in a  
21 homicide, couldn't.

22

Q        I'm asking you the reason that you  
23 immediately took her to see John French's car is  
24 that after hearing the incident that Debbie Smith  
25 reported you thought that that car could have been

1

VOLPE

306

2 involved in the homicide, right?

3 A You know, I don't want to get to the  
4 point of tunnel vision at that time. It was  
5 something that I was very interested in and we  
6 followed it up accordingly.

7 Q But the reason you followed it up  
8 was that you thought it was possible that John  
9 French's car had been involved in the homicide,  
10 right?

11 A Well, to me it was a lead that had  
12 to be investigated. Did you hear me counselor?  
13 To me it was a lead that had to be investigated.

14 Q Why?

15 A Because of all the little one, two,  
16 three, four, fives, all the information we got  
17 from Debbie Smith.

18 Q I just want to review that with you.  
19 But the reason it had to be investigated is that  
20 Debbie Smith said that she was parked in an area  
21 around the time in the evening in November that  
22 Theresa Fusco went missing, right?

23 A Uh-huh.

24 Q Yes?

25 A Yes.

1

VOLPE

307

2

Q That she heard a scream from --

3

A I have to back up on that one  
4 because I have two times. I have two dates  
5 rather. I know she changed it from the 17th to  
6 the 21st to the 10th through the 14th.

7

Q Right.

8

A That forces me to keep an open mind  
9 on that.

10

Q Right, but putting the date aside  
11 for a second, I'm just reviewing the reasons why  
12 you took her to see that car, okay, why it was a  
13 promising lead, would that be a fair statement?

14

A If it was an accurate lead, sure.

15

Q Okay, and the lead, the possible  
16 lead that you were investigating was that Debbie  
17 Smith had been stopped at a light in the area  
18 where she heard a woman scream during the period  
19 that Theresa Fusco had been last seen alive,  
20 right?

21

A Well, I'm not going to say my  
22 recollection of it just because she told me she  
23 heard a scream that it was a scream or that it was  
24 Theresa Fusco's scream. We're doing an  
25 investigation. I have to do French's car with

1 VOLPE

308

2 her, there's so many things.

3 Q I'm only trying to go back over what  
4 the reason you ..

5 A I can't lock myself into it being  
6 that.

7 MR. SCHECK: I think the tape is  
8 almost done all, okay.

9 THE VIDEOGRAPHER: The time is 1:01  
10 p.m., this concludes tape number one of the  
11 videotape deposition of Mr. Joseph Volpe.

12 (Time Noted: 1:01 p.m.)

13

14

15

16

17

18

19

20

21

22

23

24

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309

2 A C K N O W L E D G M E N T

3

4 STATE OF NEW YORK)

5 ss.:

6 COUNTY OF NASSAU)

7

8 I, JOSEPH VOLPE, hereby certify that I  
9 have read the transcript of my testimony taken  
10 under oath in my deposition of April 6, 2009; that  
11 the transcript is a true, complete and correct  
12 record of what was asked, answered and said during  
13 this deposition, and that the answers are true and  
14 correct.

15

16

17 -----  
18 JOSEPH VOLPE

19

20 Subscribed and sworn to  
before me this \_\_\_\_ day  
21 of \_\_\_\_\_, 2009.

22

23 -----  
24 NOTARY PUBLIC

25

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1  
2 C E R T I F I C A T E

3 STATE OF NEW YORK)

4 S S . :

5 COUNTY OF SUFFOLK)

6 I, JEANETTE L. Hoolan, a Notary

7 Public in and for the State of New York, do  
8 hereby certify:

9 THAT the testimony of JOSEPH VOLPE was  
10 held before me at the aforesaid time and place.

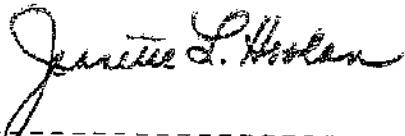
11 THAT said witness was duly sworn before  
12 the commencement of the testimony and  
13 that the testimony was taken stenographically by  
14 me and is a true and accurate transcript of  
15 my stenographic notes.

16 I further certify that I am not related to  
17 any of the parties to the action by blood or  
18 marriage and that I am in no way interested in the  
19 outcome of this matter.

20 IN WITNESS WHEREOF, I have hereunto set my  
21 hand this 17th day of APRIL, 2009.

22

23



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24 JEANETTE L. Hoolan

25

3 13

E R R A T A S H E E T

DEPOSITION OF: JOSEPH VOLPE

RE: RESTIVO VS. NASSAU COUNTY

DATE TAKEN: APRIL 6, 2000

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JOSEPH VOLPE

Subscribed and sworn to  
before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 2009.

24 |

25 NOTARY PUBLIC

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